RECEIVED
JAN 14 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 79-5940

IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1980

ROOSEVELT ESAU TURNER,

PETITIONER,

vs.

ROBERT A YOUNG, ACTING WARDEN,
VIRGINIA STATE PENITENTIARY,

DEFENDANT.

PETITION FOR WRIT OF CERTIORARI
AND FOR A WRIT OF HABEAS CORPUS
TO THE FOURTH CIRCUIT COURT OF APPEALS

Roosevelt Esau Turner
ROOSEVELT ESAU TURNER, ASSISTED

RECEIVED
JAN 14 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

ROOSEVELT ESAU TURNER,

PETITIONER,

vs.

79-5940

ROBERT A. YOUNG, ACTING WARDEN,
VIRGINIA STATE PENITENTIARY,

DEFENDANT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Roosevelt Esau Turner, pursuant to Rule 53 and 18 U.S.C. 3006A(d) (6), asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit without prepayment of costs, and to proceed in forma pauperis. Petitioner does not have assistance of counsel, but was assisted in the District Court and on appeal to the United States Court of Appeals for the Fourth Circuit.

Dated: 1-10-80

RESPECTFULLY SUBMITTED

Roosevelt Esau Turner
ROOSEVELT ESAU TURNER, ASSISTED

79-5940

RECEIVED
JAN 14 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ROOSEVELT ESAU TURNER,

v.

ROBERT A. YOUNG, ACTING WARDEN,
VIRGINIA STATE PENITENTIARY.

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO APPEAL IN FORMA PAUPERIS

STATE OF VIRGINIA:

1. That Roosevelt Esau Turner is presently incarcerated in Richmond, Virginia, and is a citizen of the United States of America.

2. That Petitioner was granted leave to file in forma pauperis in the United States District Court, Richmond, Virginia, and in the United States Court of Appeals for the Fourth Circuit.

3. That because of his poverty, Roosevelt Esau Turner is unable to pay the cost of appeal in the above styled and numbered cause.

4. That Petitioner is unable to give security for cost of appeal.

5. That Petitioner's Motion for Leave to Appeal in forma pauperis is not filed for the purpose of delay but in order that justice might be done.

Roosevelt Esau Turner
ROOSEVELT ESAU TURNER, ASSISTED

NOTARY PUBLIC

Sworn and subscribed to before me this 10th day of January, 19 80.

I am a notary public in and for the City of Richmond, Virginia.

My commission expires: 3/4/83.

Margaret G. Brown
NOTARY PUBLIC SIGNATURE/SEAL

RECEIVED
JAN 14 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1980

NO. 79-8180

ROOSEVELT ESAU TURNER,

PETITIONER, 79-5940

v.

ROBERT A. YOUNG, ACTING WARDEN,
VIRGINIA STATE PENITENTIARY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Roosevelt Esau Turner, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-styled case on October 18, 1979

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction is attached as Appendix A.

JURISDICTION

Petitioner exhausted his state remedies in The Supreme Court of Virginia on December 13, 1977. The Memorandum-Opinion of the United States District Court, Richmond Division, was entered on March 16, 1979, Case No. 78-0551-R. The United States Court of Appeals for the Fourth Circuit DENIED petitioner's petition for a rehearing on November 20, 1979, Appendix B. The Jurisdiction of the Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Was petitioner denied a fair and impartial trial by jury by the admission by the court of a claimed prior statement of petitioner that was inconsistent with his alibi defense when he himself did not testify, and (a) when said claimed statement, if made by petitioner (ARGUENDO) was taken in violation of his Miranda rights ?

2. Was the evidence insufficient as a matter of law to sustain the convictions ?

STATEMENT OF THE CASE

Defendant, Roosevelt Esau Turner, was charged with murder in the first degree of his wife, Ruth Anna Turner, and the use of a firearm during the commission of same. Petitioner also was charged with malicious wounding of his step-daughter, Artorita Smith Bey. All offenses were allegedly to have taken place on the 4th day of January, 1977, in the City of Richmond, Virginia.

The Commonwealth's evidence indicated that the offenses had taken place at approximately 8:00 P.M. and that the time of death was approximately 8:00 P.M.

Upon hearing the 11:00 P.M. news report Petitioner requested his sisters to drive him to Richmond so he might find out what had happened. It was during this return trip to Richmond that the police stopped Audrey Turner's vehicle and arrested the defendant for the alleged shootings.

Samuel Turner, Jr., stated under oath that he met the petitioner at about 7:00 P.M. on January 4, 1977, and that he took the petitioner directly to his mother's house in Chesterfield County on Courthouse Road. This witness stated that his sisters, Helen Conner and Juanita Turner, were present when he and the petitioner arrived.

Helen Conner and Juanita Turner both testified without discrepancy that they were present when Roosevelt E. Turner arrived at 7711 Courthouse Road in Chesterfield County at about 7:30 P.M., the evening of the murder and alleged malicious wounding. They testified that petitioner arrived with Samuel Turner, Jr. who dropped him off at the residence. They both further testified that petitioner appeared undisturbed and normal to them until the point when they all heard about Ruth Turner being shot on the 11:00 P.M. news.

Audrey Turner, petitioner's mother, testified that she was not present when the defendant first arrived at her home, but that at 9:30 P.M. she arrived and found Juanita, Helen and Roosevelt Turner watching television.

The only eye witness claimed by the Commonwealth was the step-daughter of petitioner, Artorita Smith Bey, whose testimony was uncooroborated.

However, the Commonwealth called Detective D.C. Gery on rebuttal and said detective claimed that he saw petitioner on the 5th of January at 5:25 A.M. in the early morning, and before petitioner had ever been before a magistrate or had been advised of his Miranda rights, and at this time that petitioner had told said detective that he had been in a Beer Garden, Bar, etc, called

"Gregory's". Said testimony of said detective was allowed into evidence over defense counsel's objections, and at the time the trial judge stated that even though the Supreme Court might reverse it he was going to allow Detective D.C. Gery's hearsay testimony, which was perjured testimony.

No Miranda rights warning card was ever introduced to substantiate that petitioner had been advised of his rights prior to being questioned by Detective Gery prior to allegedly giving the claimed statement to Gery. The records themself are devoid of any Miranda rights card signed by petitioner, or any reduced statements from tapes, etc.. The only claimed evidence that Detective Gery had in court was notes he claimed he had made, and among these he affirmed that petitioner was stopped by the police in Helen Connor's vehicle on Route 360 driving towards the City of Richmond sometime after 11:00 P.M. on the 4th of January, 1977.

Additionally, no murder weapon was ever found, and your petitioner did not own any kind of firearm.

REASONS FOR GRANTING THE WRIT

Your Petitioner states that he did not give any statement to Detective D.C. Gery that he was in Gregory's on the evening of the 4th of January, 1977. Petitioner further declares that Detective D.C. Gery gave perjured testimony to the jury concerning this matter. It is petitioner's firm belief that the Commonwealth knew that petitioner would be acquitted of the charges based on the uncooroborated testimony of his step-daughter and that the Commonwealth put said Detective on the witness stand, on rebuttal, to cooroborate petitioner's step-daughter for this reason.

The statement claimed to have been made by the petitioner to Detective D.C. Gery that petitioner was in Gregory's should have never been admitted into evidence without[1] first establishing the proof that petitioner had got up at 5: 26 A.M. in the early morning , some 4 or 5 hours after his arrest, and intelligently made such a statement, and[2] without proof that petitioner hadwaived his Miranda rights and gave such a statement, which he did not.

There is absolutely no proof whatsoever that petitioner was advised of his rights pursuant Miranda v. Arizona, 384 U.S. 436(1966). Petitioner's right to counsel attached when he was placed in custody, Escobedo v. Illinois, 378 U.S. 478(1964). ACCORDINGLY, the court stated in Lamb v. Commonwealth, 217 Va. 307, 310:

> " ONLY WHEN AFFIRMATIVE WAIVER OF THE MIRANDA RIGHTS MAY THE POLICE QUESTION A PRISONER" SEE Clark v. Oliver, D.C. Va. (1972), 346 F.Supp. 1345, also.

Surely, this does not mean that a Detective, or and other law enforcement official can come into a courtroom with some notes he doesn't even show anyone, even if the notes were admissible, and "suggest" by the notes that a defendant waived his rights, intelligently, etc. and gave a statement to that official which is inconsistent to defendant's alibi defense, and which is so highly prejudicial to the defendant as to have a bearing on the outcome of a case where defendant's life and liberty are at stake, and especially where the suggestability of a law official's testimony acts as the scale which tips the balance of justice . Surely the four(4) witnesses for the petitioner and their testimony had some degree of favorable doubt in the minds of the jury before Detective D.C. Gery gave his perjured testimony to cooroborate the petitioner's step-daughter!

MOREOVER, the Supreme Court stated in Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908(1964) as follows:

> "THE PHILOSOPHY OF EACH AMENDMENT AND OF EACH FREEDOM IS COMPLIMENTARY TO, ALTHOUGH NOT DEPENDENT UPON, THAT OF THE OTHER IN ITS SPHERE OF INFLUENCE—THE VERY LEAST THAT TOGETHER THEY ASSURE IN EITHER SPHERE IS THAT NO MAN IS TO BE CONVICTED ON UNCONSTITUTIONAL EVIDENCE . . . . "

And, the court stated in Longer v. State of N.C., 260 F.Supp. 970:

> " (I)T IS NOW EXIOMATIC THAT A DEFENDANT IN A CRIMINAL CASE IS DEPRIVED OF DUE PROCESS OF LAW IF HIS CONVICTION IS FOUNDED, IN WHOLE OR IN PART, UPON AN INVOLUNTARY CONFESSION, WITHOUT REGARD FOR THE TRUTH OR FALSITY OF THE CONFESSION, Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760, AND EVEN THOUGH THERE IS AMPLE EVIDENCE ASIDE FROM THE CONFESSION TO SUPPORT THE CONVICTION."

WHEREFORE, for the reasons stated herein your petitioner respectfully prays that a Writ of Certiorari be granted.

Petitioner argues in his second claim as to the sufficiency of the evidence that the Fourth Circuit Court of Appeals did not render a fair opinion in affirming petitioner's convictions under the new doctrine set by the United States Supreme Court in Jackson v. Virginia, 47 U.S.L.W. 4883 (U.S), No. 78-5283, June 28, 1979.

Petitioner asks this Honorable Court to find that based"upon the evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."

In the first instance the petitioner avers that the personal feelings of the trial judge that petitioner and all of his witnesses were lying (Transcript Page 114) prejudiced the petitioner so critically as to deny him a fair trial because as the records show it was his personal feelings

prompted him to allow Detective D.C. Cery's testimony into evidence, even if"the Supreme Court might reverse the case" (Transcript Page 114), inter alia.

Secondly, your petitioner avers that a rational trier of fact would not accept the biased testimony of petitioner's step-daughter, who admitted that the petitioner had never threatened or harmed her in any way. Artorita Smith Bey even admitted on cross examination that she had hit your petitioner in the head with an eas-tray, she did not like him, or had she ever gotten along with him. She even stated she hated the petitioner, and that petitioner had been the cause of her being forced to move from her mother's home because she smoked Marihuana, was a disobedient deliquent, etc..

Thirdly, petitioner avers that no rational trier of fact would have found him guilty based on the uncooroborated testimony of his step-daughter, especially when the Commonwealth's Attorney did not refute the alibi defense of petitioner established through his four(4) witnesses. Their testimony was sincere and given without compulsion. Little or no variation existed between them. All testified that the petitioner had been with them in Chesterfield and that when he learned of his wife's murder he immediately proceeded to return to Richmond to see what had happened. Even the police report confirmed that he was heading towards Richmond when arrested. Petitioner contends that Miss Bey's testimony was entirely uncorroborated and that having shown her hatred and propensity to lie against a man who she did not like that the verdicts of guilty rendered by the jury was inproper and incredible, and without regard to the overwhelming evidence of innocence presented by the petitioner, therefore said verdicts were not the product of a rational trier of fact and the jury could not have rationally found the essential elements of the crimes beyond a reasonable doubt.

In conclusion, and with further reference to petitioner's first allegation, and further in support of this second allegation pertaining to the sufficiency of the evidence, petitioner states that the jury was duly influenced to a degree sufficient to prejudice the petitioner and sway the minds of the fact finders by the court's admission into evidence of the statement alleged by Detective D.C. Gery when he had not been subpoenaed, and on rebuttal, for the purpose of impeaching petitioner when he did not take the stand in his own defense.

Detective Gery was called by the Commonwealth as a rebuttal witness (Tr.P. 115). At this time a statement attributed to the defendant was permitted

over objections and arguments by defense counsel, and under extraordinary circumstances due to the trial judge's own personal feelings concerning the matters of the case, for the purpose of impeaching the witnesses called by the defense(Tr.P. 118). Miss Bey's testimony was already discredited.

Roosevelt Turner did not take the stand in his defense and, therefore, it cannot be said that the Commonwealth offered this statement into evidence as a prior inconsistent statement. Likewise, it is not and cannot be considered a prior inconsistent statement of the defense witnesses since they did not make it.

The statement clearly amounted to inadmissible hearsay and was not properly introduced, inadmissible, not proper evidence to be considered by the jury, as it did not amount to a prior inconsistent statement of any of the defense witnesses. Williams v. Commonwealth, 193 Va. 764 (1952); Crooty v. Commonwealth, 135 Va. 508 (1923).

In the case of Powers v. Commonwealth, 182 Va. 669 (1944) the Court pointedly stated that hearsay statements are not admissible in evidence. Id. at 675, the Court in this case went on to say:

> "WE CANNOT SAY WHAT EFFECTS THE HEARSAY EVIDENCE MAY HAVE HAD UPON THE MINDS OF THE JURORS..... IT MAY HAVE BEEN HIGHLY PREJUDICIAL AND FOR THAT REASON IT WAS ERROR TO ALLOW ITS ADMISSION FOR THE CONSIDERATION OF A JURY." Id.

Petitioner submits that officer Gery's testimony was highly prejudicial and destructive of this petitioner's rights. The testimony was not of a collateral nature but tended to bear squarely upon the defense set forth at trial by the petitioner's counsel. Therefore, the petitioner contends it could not be considered to be simply a harmless error which would not mandate a reversal.

It is respectfully submitted that the Court overstepped its legal limitations and erred in admitting this testimony over defense objections.

CONCLUSION

The petitioner, Roosevelt Esau Turner, prays that this Honorable Court will see fit to grant him a Writ of Certiorari in this matter based upon either or both of the Assignments of violations of his Constitutional rights as set forth in this petition.

Roosevelt Esau Turner R.
ROOSEVELT ESAU TURNER, ASSISTED

INDEX

PAGE

Opinion Below. 1

Jurisdiction. 1

Questions Presented. 1

Statement of the Case. 2-3

Reasons For Granting The Writ. 3-6

Conclusion. 6

APPENDIX "A" , "B" , "C"

Unpublished Opinion of the Fourth Circuit
Court of Appeals of October 18, 1979

TABLE OF CITATIONS
Cases

Miranda v. Arizona, 384 U.S. 436 (1966). 3

Escobedo v. Illinois, 378 U.S. 478 (1964). 3

Lamb v. Commonwealth, 217 Va. 307, 310. 3

Clark v. Cliver, D.C. Va. (1972), 346 F. Supp. 1345. 3

Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed 2d 908. . 4

Longer v. State of N.C., 260 F. Supp. 970. 4

Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760. . 4

Jackson v. Virginia, 47 U.S.L.W. 4883(U.S.) 4

Transcript Page 114. 5

Transcript Page 115. 5

Transcript Page 118. 6

Williams v. Commonwealth, 193 Va. 764 (1952). 6

Groety v. Commonwealth, 135 Va. 508 (1923). 6

Powers v. Commonwealth, 182 Va. 669 (1944). 6

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-8180

Roosevelt Esau Turner,

Appellant,

versus

Robert A. Young, Acting Warden,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Submitted August 20, 1979. Decided October 18, 1979

Before HAYNSWORTH, Chief Judge, WINTER and PHILLIPS, Circuit Judges.

(Roosevelt Esau Turner, Appellant Pro Se. Robert H. Herring, Jr., Assistant Attorney General, Attorney for Appellee.)

APPENDIX "A"

PER CURIAM:

A review of the record and the district court's opinion discloses that an appeal from its order refusing habeas corpus relief would be without merit. Because the dispositive issues recently have been decided authoritatively, we deny a certificate of probable cause to appeal, dispense with oral argument, and dismiss the appeal on the reasoning of the district court.[1/] Turner v. Young, No. 78-0551-R (E.D. Va. Mar. 16, 1979).

DISMISSED.

---

[1] Although the district court evaluated the sufficiency of the evidence in light of Williams v. Peyton, 414 F.2d 776 (4th Cir. 1976), the evidence was sufficient under the standard set forth in Jackson v. Virginia, 47 U.S.L.W. 4883 (U.S. June 28, 1979).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-8180

FILED

NOV 30 1979

U. S. Court of Appeals
Fourth Circuit

Roosevelt Esau Turner,

Appellant,

versus

Robert A. Young, Acting Warden,

Appellee.

O R D E R

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Phillips, for a panel consisting of Judge Haynsworth, Judge Winter, and Judge Phillips.

For the Court,

/s/ William K. Slate, II

CLERK

APPENDIX "B"

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 13th *day of* December, 1977.

The petition of Roosevelt Esau Turner for a writ of error and supersedeas to judgments rendered by the Circuit Court of the City of Richmond, Division II, on the 19th day of May, 1977, in prosecutions by the Commonwealth against the said petitioner for felonies (Cases 77-106-F, 77-107-F and 77-108-F), having been maturely considered and a transcript of the record of the judgments aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgments of the said court, which court shall allow court-appointed counsel the sum of $100 as compensation for services rendered on this appeal, and also his necessary direct out-of-pocket expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the costs to be taxed by the clerk of this court and the costs to be assessed in this case by the clerk of the court or courts below.

Record No. 771284

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Richard R. Brunk
Deputy Clerk

Costs due the Commonwealth by plaintiff in error in Supreme Court of Virginia:

Attorney's fee	$100.00 plus his costs and expenses
Filing fee	25.00

Teste:

Allen L. Lucy, Clerk

By: Richard R. Brunk
Deputy Clerk

APPENDIX "C"

RECEIVED
MAR 21 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL COP

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 795940

ROOSEVELT ESAU TURNER,

Petitioner,

v.

J. P. MITCHELL, WARDEN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

MARSHALL COLEMAN
Attorney General of Virginia

RICHARD B. SMITH
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

ATTORNEY GENERAL OF VIRGINIA
RICHMOND, VIRGINIA 23219

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF FACTS	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
ARGUMENT	4
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

Cases

	Page
Atwell v. State of Arkansas, 426 F2d 912 (8th Cir. 1970)	6
Freeman v. Slayton, 550 F.2d 909 (4th Cir. 1977)	6
Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960)	6
Gryger v. Burke, 334 U.S. 728 (1948)	6
Jackson v. Virginia, ____ U.S. ____, 99 S.Ct. 2781, 61 L.Ed.2d 560 (June 28, 1979)	8
LaBrasca v. Misterly, 423 F.2d 708 (9th Cir. 1970)	6
Land v. Commonwealth, 211 Va. 223, 222 S.E.2d 12 (1970)	7
Miranda v. Arizona, 384 U.S. 436 (1966)	1, 5
Rice v. Sious City Memorial Park Cemetery, Inc., et al., 349 U.S. 70 (1954)	4
Schaefer v. Leone, 443 F.2d 182 (2d Cir. 1971)	6
Tyree v. Lariew, 208 Va. 382, 158 S.E.2d 140 (1967)	6
United States Ex Rel Bleimehl v. Cannon, 525 F.2d 414 (7th Cir. 1975)	6

OTHER AUTHORITIES

Rule 19, Rules of the Supreme Court of the United States	4
C. FRIEND, LAW OF EVIDENCE IN VIRGINIA (1977)	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5940

ROOSEVELT ESAU TURNER,

Petitioner,

v.

J. P. MITCHELL, WARDEN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

OPINIONS BELOW

There is no reported opinion of the Supreme Court of Virginia; however, the order rejecting the petition for appeal is set forth in petitioner's Appendix "C".

The order, and accompanying memorandum, dismissing petitioner's petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Richmond Division, is set forth in Respondent's Appendix.

The unpublished per curiam decision of the United States Court of Appeals for the Fourth Circuit denying petitioner's appeal of the District Court's decision is set forth in petitioner's Appendix "A".

The order of the United States Court of Appeals for the Fourth Circuit denying petitioner's petition for rehearing is set forth in petitioner's Appendix "B".

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1254.

STATEMENT OF FACTS

At petitioner's trial on May 19, 1977, his stepdaughter, Artorita Smith Bey, testified that on January 4, 1977, she and Ruth Anna Turner, her mother and petitioner's estranged wife, were at their Fendall Avenue home in Richmond when the petitioner arrived to talk to Mrs. Turner. Shortly thereafter, Mrs. Turner asked Miss Bey to take the petitioner to South Richmond; Miss Bey drove, with Mrs. Turner in the middle and the petitioner on the far side of the front seat. (Tr. at 28-29).

When they reached South Richmond, Mrs. Turner told Miss Bey to stop the car and let the petitioner out instead of taking him to the place he wanted to go. The petitioner then pulled out a gun, but Mrs. Turner started screaming and grabbed petitioner's hand. Miss Bey tried to run, but petitioner shot her in the back, probably putting her in a wheelchair for the rest

of her life. Although she had fallen to the ground, Miss Bey looked up and saw the petitioner shoot Mrs. Turner in the neck. (Tr. at 30-32). Mrs. Turner died, and a post-mortem examination indicated that the cause of death was a severe hemorrhage from the gunshot wound to the neck. (Tr. at 23).

A Richmond police detective testified that he had found a man's hat in the front seat of the murder vehicle shortly after arriving on the scene. (Tr. at 43). Miss Bey identified the hat as belonging to petitioner and testified that he was wearing it on January 4th. (Tr. at 28).

The defense consisted entirely of petitioner's two brothers, sister, and mother, all testifying that petitioner had been at his mother's house at the time of the shooting. (Tr. at 51-101). In rebuttal, however, police detective Gery testified that the day after the shooting, and after being advised of his "Miranda"[1] rights, the petitioner claimed that he had spent the evening of January 4th at a beer joint called Gregory's. (Tr. at 116-118).

QUESTION PRESENTED

Whether A Case With No Important Question Of Federal Law, And Involving No Conflict Of Decision Between The Opinion In The Present Case And Any Decision Of This Court, Should Be Reviewed?

STATEMENT OF THE CASE

On May 19, 1977, the Petitioner was tried before a jury in the Circuit Court for the City of Richmond, Division II,

---

[1] Miranda v. Arizona, 384 U.S. 436 (1966)

found guilty, and sentenced to life imprisonment in the Penitentiary for murder in the first degree, twenty years for malicious wounding, and one year for using a firearm in the commission of a felony.

Petitioner noted an appeal of his convictions to the Supreme Court of Virginia. On December 13, 1977, the Supreme Court of Virginia affirmed petitioner's convictions without an Opinion.

Petitioner then petitioned the United States District Court for the Eastern District of Virginia for a writ of habeas corpus; this petition was denied on March 16, 1979.

Petitioner appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit which affirmed the lower court's decision on October 18, 1979, and denied petitioner a rehearing on November 20, 1979.

ARGUMENT

THIS CASE IS NOT THE TYPE WHICH CALLS FOR INVOCATION OF THIS COURT'S CERTIORARI POWER.

Although this Court has broad statutory authority to review petitions for writ of certiorari, a petition will be granted only where there are special and important reasons therefor. Rule 19, Rules of the Supreme Court of the United States; Rice v. Sious City Memorial Park Cemetery, Inc., et al., 349 U.S. 70 (1954). In the case at bar, the petitioner is raising issues dealing with the admission and overall sufficiency of evidence. Neither of these issues is new or novel, both have

been fully explored by this Court, and there is no conflict between the federal circuits as to their treatment.

The thrust of petitioner's first argument is that his convictions were obtained by a violation of the privilege against self-incrimination in that the trial court erred in admitting a prior statement of the petitioner that was inconsistent with his alibi defense when he himself did not testify.

Initially, the Respondent would note that, although Petitioner claims here that there was no proof that he had been advised of his "Miranda" rights before making the statement in question, the trial record shows that the police detective testified that Petitioner was so advised:

> Q. Did you advise him of certain constitutional rights?
>
> A. I did, sir.
>
> Q. Did you advise him with reference to this particular incident in question?
>
> A. Yes, sir. I advised him of his constitutional rights, and also the charges that were placed against him. (Tr. at 116).

In fact, not only did the detective so testify, but Petitioner's counsel stipulated to the advisal:

> Mr. Simmons: We will stipulate that he was properly advised.
>
> The Court: Under Miranda versus Arizona?
>
> Mr. Simmons: Yes, sir. (Tr. at 116-117).

As for the admissibility of the statement in question, it is well established that the admissibility of evidence is a matter of state law and does not generally involve a federal constitutional question. Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960); United States Ex Rel Bleimehl v. Cannon, 525 F.2d 414 (7th Cir. 1975); Schaefer v. Leone, 443 F.2d 182 (2d Cir. 1971); Atwell v. State of Arkansas, 426 F.2d 912 (8th Cir. 1970); LaBrasca v. Misterly, 423 F.2d 708 (9th Cir. 1970). Here, of course, the Supreme Court of Virginia concluded, on this exact point, that no error had been made by the trial court. See petitioner's Appendix "C".

It is only in situations impugning fundamental fairness or infringing upon specific constitutional protections that a federal question is presented. Freeman v. Slayton, 550 F.2d 909 (4th Cir. 1977). This Court has held in a different context, however, that, even if an error of state law has occurred, every such decision by a state court does not rise to the level of federal constitutional magnitude. Gryger v. Burke, 334 U.S. 728 (1948).

In any event, it is clear that the trial court's admission of petitioner's previous statement was not erroneous under Virginia law. Extra-judicial statements such as the petitioner's are statements made outside the scope of court proceedings; they are evidential admissions and are admissible against the pronouncing party as an exception to the hearsay rule. See Tyree v. Lariew, 208 Va. 382, 158 S.E.2d 140 (1967). Indeed,

such an admission "...affords evidence of a most satisfactory nature and may furnish the strongest and most convincing evidence of truth." Id. at 385.

Party admissions, furthermore, need not be against the party's interest when made, but will be against the party's interest at the time of trial. C. FRIEND, LAW OF EVIDENCE IN VIRGINIA § 251 (1977).[2] This exception to the hearsay rule applies in both civil and criminal cases. See Land v. Commonwealth, 211 Va. 223, 222 S.E.2d 12 (1970). Where the admission is made by a defendant in a criminal case such as here, it is called a confession. FRIEND, supra, at 467.

The Respondent respectfully submits, therefore, that petitioner's prior statement was properly admitted under Virginia law, and that his due process rights were clearly not violated.

As to petitioner's allegation concerning the overall sufficiency of the evidence at his trial, there was eyewitness evidence of his murder of the victim, and direct evidence of his malicious wounding of Miss Bey and his use of a firearm; (Tr. at 30-31); furthermore, physical evidence was found placing petitioner at the scene. (Tr. at 28, 43).

Even disregarding petitioner's prior statement, it is respectfully submitted that any rational trier of fact could have found petitioner guilty beyond a reasonable doubt, and

---

2 In the instant case, the statement in question was made prior to trial, but was introduced at trial as rebuttal evidence in response to petitioner's alibi defense. (Tr. at 117-118).

that the constitutional standard for measuring the sufficiency of evidence under Jackson v. Virginia, ____ U.S. ____, 99 S.Ct. 2781, 61 L.Ed.2d 560 (June 28, 1979), has clearly been met as concluded by the United States Court of Appeals for the Fourth Circuit. See petitioner's Appendix "A".

CONCLUSION

For the reasons presented, the respondent respectfully submits that the issues raised in this case are neither important nor substantial, and that the Court should deny the petition for writ of certiorari.

Respectfully submitted,

MARSHALL COLEMAN
Attorney General of Virginia

Richard B. Smith

RICHARD B. SMITH
Assistant Attorney General

Supreme Court-State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

This is to certify that I, Richard B. Smith, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and that on this 19th day of March, 1980, I mailed, with first class postage prepaid, a copy of the Respondent's Brief in Opposition to Grant of Certiorari to Roosevelt Esau Turner, #112234, P. O. Box 27264, Richmond, Virginia 23261.

Richard B. Smith

Richard B. Smith
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED

MAR 16 1979

CLERK, U. S. DIST. COURT
RICHMOND, VA.

ROOSEVELT E. TURNER, Petitioner,	)	
	)	Civil Action No.
v.	)	
	)	78-0551-R
ROBERT A. YOUNG, Warden, Respondent.	)	

ORDER

For the reasons stated in the memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED and ORDERED that the instant petition for a writ of habeas corpus be, and the same is hereby denied, and this action stands dismissed.

Should petitioner desire to appeal, written notice of appeal must be filed with the Clerk of this Court within thirty (30) days of this date.

In the event no such appeal is noted the Clerk is directed to return the state court records to their appropriate repository.

Let the Clerk send copies of this order and the memorandum to petitioner and to the Attorney General of Virginia.

/s/ [illegible]
UNITED STATES DISTRICT JUDGE

Date: MAR 16 1979

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
MAR 16 1979
CLERK, U. S. DIST. COURT
RICHMOND, VA.

ROOSEVELT E. TURNER,
Petitioner,

v.

ROBERT A. YOUNG, Warden,
Respondent.

Civil Action No.
78-0551-R

MEMORANDUM

Roosevelt E. Turner, an inmate confined at the Virginia State Penitentiary, proceeding pro se, brings this petition for a writ of habeas corpus in forma pauperis under 28 U.S.C. § 2254 (1970). Jurisdiction vests in this court pursuant to 28 U.S.C. § 2241(a). Respondent has replied to petitioner's complaint with a motion to dismiss, to which the petitioner has responded. The matter is therefore ripe for disposition.

Petitioner is attacking the validity of his convictions for murder, malicious wounding, and felonious use of a firearm in the commission of a felony. Petitioner makes the following allegations in his petition: (1) that his conviction was obtained by a violation of the privilege against self-incrimination in that the court erred in admitting a prior statement of petitioner that was inconsistent with his alibi defense when he himself did not testify; and (2) that the evidence was insufficient as a matter of law to sustain the convictions. After due consideration of petitioner's claims and inspection of the transcript and record of the convictions aforesaid, the Court is of the opinion that the petition for a writ of habeas corpus must be denied for the following reasons.

The trial transcript reveals that evidence was admitted that the decedent sustained her wounds at approximately 8:00 p.m. on January 4, 1977. Petitioner put forth the defense of alibi at trial. Petitioner's brother, Samuel Turner, Jr., testified that he took the petitioner to their mother's home in Chesterfield County the evening of January 4, 1977 at

approximately 7:00 p.m., arriving at approximately 7:30 p.m. Petitioner's sister, Helen Conner, testified that she was at her mother's home on January 4, 1977 and saw the petitioner arrive "about 7:30 p.m." Mrs. Conner further testified that the petitioner stayed at his mother's home until "about something after 11:00," when she took petitioner back to Richmond. This testimony was corroborated by another sister, Juanita Turner, and petitioner's mother, Audrey Turner. As a rebuttal witness, the Commonwealth called Donald C. Gery, a police officer assigned to the Detective Division, Richmond Bureau of Police. Detective Gery testified that on January 5, 1977, the morning following the shootings leading to the charges against petitioner, he, Gery, interviewed the petitioner at police headquarters after petitioner had been placed under arrest, advised him of the charges against him, and advised him of his constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966). Detective Gery stated that at that interview the petitioner told him "that he knew nothing about the shootings, and that he was in Gregory's" beer dispensory the entire evening of January 4, 1977. Petitioner alleges that since he himself did not testify in his own defense the trial court erred in admitting Detective Gery's testimony.

Petitioner's allegation is without merit. His decision not to testify in no way prevents the prosecution from putting on evidence of what he may have told the police, provided that the interrogation was in all respects consistent with the dictates of the Fifth, Sixth, and Fourteenth Amendments. Petitioner alleges no violation by the police of the rights secured by these amendments. Accordingly, exculpatory statements petitioner may have made upon his arrest are fairly admissable to rebut any conflicting testimony introduced in petitioner's defense, regardless of whether petitioner takes the stand.

Petitioner next claims that the evidence was insufficent as a matter of law to sustain his conviction. It is firmly established that "[w]hen the sufficiency of the evidence supporting a state conviction is challenged by way of federal habeas corpus, the sole constitutional question is whether the conviction rests upon any evidence at all." Williams v. Peyton, 414 F.2d 776, 777 (4th Cir. 1969) (citing Young v. Boles, 343 F.2d 136 (4th Cir. 1965)). This Court cannot conceive of a case where the aforementioned standard could be more amply satisfied than the instant one. An eye witness to the shootings testified that on the night of January 4, 1977, she was driving an automobile occupied by her mother and the petitioner (her stepfather); her mother ordered her to pull the car over and that before she could do so the petitioner produced a gun, her mother commenced to scream, grabbed the petitioner's hand and stated "[O]h my God, please don't hurt my daughter." The witness, Mrs. Bay, testified that she parked the car, reached up her hand, and petitioner shot her in the hand; that she then stepped out of the car, and the petitioner shot her in the back, leaving her crippled for life. Mrs. Bay further testified that after she fell to the ground, she looked up and saw the petitioner grab her mother and shoot her in the neck. The Court holds that this eye witness account is at the very least evidence supporting the state court conviction and thus satisfies the standard proscribed by Williams v. Peyton, supra. Accordingly, as to petitioner's claim that the evidence is sufficient as a matter of law to sustain his conviction, the

respondent's motion to dismiss will be granted.

An appropriate order shall issue.

UNITED STATES DISTRICT JUDGE

Date: MAR 16 1979

Cir. Ct.

APR 11 PAGE 13

RECEIVED
MAR 31 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL COPY

OCTOBER TERM, 1979

No. 795940

ROOSEVELT ESAU TURNER,

Petitioner,

v.

J.P. MITCHELL, WARDEN

Respondent.

PETITIONER'S BRIEF IN SUPPORT TO GRANT OF CERTIORARI

Reply Brief

ROOSEVELT ESAU TURNER, ASSISTED

VIRGINIA STATE PENITENTIARY
RICHMOND, VIRGINIA 23261

By Donald M. Carter

TABLE OF CONTENTS

	Page
OPINIONS BELOW.	1
STATEMENT OF FACTS.	2-3
QUESTION PRESENTED.	1
ARGUMENT.	3
CONCLUSION.	4-5
CERTIFICATE OF SERVICE.	5

TABLE OF CITATIONS

Cases

PAGE

MIRANDA v. ARIZONA, 384 U.S. 436, 475. 1-2-3-4

RICE v. SIOUS CITY MEMORIAL PARK CEMETARY, Inc., et al., 349 U.S. 70. 4

CHARLES TAGUE v. STATE OF LOUISIANA, NO. 79-5384. Deceded January 21, 1980. 4

ESCOBEDO v. ILLINOIS, 378 U.S. 478, 490, n. 14. 4

JOHNSON v. ZERBST, 304 U.S. 458 (1938). 4

NORTH CAROLINA v. BUTLER, 441 U.S. 369——. 4

JACKSON v. VIRGINIA, 47 U.S.L.W. 4883. 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5940

ROOSEVELT ESAU TURNER,

Petitioner,

v.

J.P. MITCHELL, WARDEN,

Respondent.

PETITIONER'S BRIEF IN SUPPORT TO
GRANT OF CERTIORARI

OPINIONS BELOW

All opinions have been set forth in petitioner's original petition for a writ of certiorari; i.e. exhaustion of State remedies, Appendix "C"; the Memorandum of the United States District Court for the Eastern District of Virginia; United States Court of Appeals for the Fourth Circuit, Appendix "A"; and petition for rehearing, Appendix "B".

QUESTION PRESENTED

WHETHER AN INCULPATORY STATEMENT ALLEGEDLY GIVEN TO AN INVESTIGATING OFFICER AND INTRODUCED AT PETITIONER'S TRIAL WAS ADMISSIBLE BECAUSE IT WAS OBTAINED IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS AND PURSUANT THE GOVERNING PRINCIPLES OF MIRANDA v. ARIZONA, 384 U.S. 436, 475? AND, DID THE ADMISSION OF SAID STATEMENT VIOLATE PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION?

STATEMENT OF FACTS

At petitioner's trial on May 19, 1977, his depraved stepdaughter, Artorita Smith Bey, testified that on January 4, 1977, she had seen her stepfather, Roosevelt Esau Turner, shoot her mother, Ruth Anna Turner, after she herself had been shot in the back and paralized. Ms. Bey claimed to have turned over after having been shot and looked up and saw said shooting. (Tr. at 30-32)

No weapon was ever found, and no weapon was alleged to have belonged to the petitioner. However, Ms. Bey also claimed that she had seen petitioner wearing a hat which was found by a policeman in the back seat of the automobile that the deceased was shot in. (Tr. at 28)

Petitioner contends that since he and his wife were attempting to re-establish their marriage and he frequently rode with his wife in the automobile that he had left said hat in the automobile on an occasion prior to the fatal shooting of his dear and beloved wife.

Petitioner's alibi defense consisted of the fact that he had been at his mother's house at the time of the shootings, and that upon hearing that his wife had been shot on the eleven O'Clock news he asked one of his sisters to take him into Richmond, Virginia to inquire as to his wife's condition. Petitioner was stopped by police on his way to Richmond. (Tr. at 51-101) Petitioner's two brothers, his sister, and mother all testified to these facts.

In order to impeach petitioner's alibi defense and his witnesses the prosecution introduced detective Gery on rebuttal and he claimed that petitioner had told him the following day after the alleged crimes that he had been in a beer Tavern called Gregory's all the evening of January 4, 1977. (Tr. at 116-118)

Detective Gery alleged that the day after the shootings petitioner had been advised by said detective of his Miranda rights, (citation omitted) and that at this late time the petitioner had made the inculpatory statement of having been in Gregory's Tavern, instead of at his mother's house where he really was, and

this statement was made in open court in the presence of the jury. Petitioner states that while detective Gery was testifying to the jury that he had some papers in his hands, which were never introduced as evidence, and he was waiving these in a suggestive manner while exclaiming that he had given petitioner his Miranda rights (citation omitted), and that these papers were also the notes that he had taken and contained the testimony that he was giving to the jury. (Tr. at 116-118)

However, the prosecution for the State did not bear its burden of establishing the isolated circumstances under which the interrogation took place without the presence of counsel for petitioner and did not make available corroborated evidence of warnings given during this incommunicado interrogation as clearly stated as one of the principles that govern Miranda v. Arizona. Accordingly, no such corroboration of said Miranda rights has ever been established by the State. Petitioner never gave detective Gery any statements; he was not given any Miranda warnings either.

Petitioner's counsel, Mr. Simmons, never inquired of him concerning the waiver or giving of any rights warnings pursuant Miranda. Petitioner must concede that in his counsel's ineffectiveness in assisting him that said counsel did stipulate that petitioner had been properly advised. However at this time petitioner was entirely ignorant of the legal consequences that said stipulation by his counsel would have on the outcome of his trial and the violation of his Constitutional rights, and he was unable to object or interrupt when this stipulation was made due to the circumstances in the proceedings of his trial had he been cognizant of the legal consequences.

ARGUMENT

THIS CASE IS THE TYPE WHICH CALLS FOR INVOCATION OF THIS HONORABLE COURT'S CERTIORARI POWER BECAUSE IN THE ABSENCE OF CORROBORATIVE PROOF THAT PETITIONER WAIVED HIS MIRANDA RIGHTS OR THAT HE WAS EVEN GIVEN SUCH WARNINGS THE STATEMENT GIVEN TO THE JURY BY DETECTIVE GERY WAS INADMISSIBLE, VIOLATING PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION.

Petitioner states that this Court should exercise its broad statutory authority and grant him a petition for writ of certiorari pursuant Rule 19,

Rules of the Supreme Court of the United States, because of the "Special" and "Important" reasons and issues involved in this instant case; Rice v. Sioux City Memorial Park Cemetary, Inc., et al., 349 U.S. 70 (1954).

MOREOVER, in this Court's recent case it reiterated the foundations of the foregoing issues; Charles Tague v. State Of Louisiana, NO. 79-5384. Decided January 21, 1980. In granting certiorari this Court stated, inter alia:

> " If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self- incrinination and his right to retain or appointed counsel. Escobedo v. Illinois, 378 U.S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." 384 U.S. 436, 475.

And, in this same case, supra, this Court stated:

> " The courts must presume that a defendant did not waive his rights; the prosecution's burden is great...." North Carolina v. Butler, 441 U.S. 369——.

Finally, this Court also stated:

> "IN THIS CASE NO EVIDENCE AT ALL WAS INTRODUCED TO PROVE THAT PETITIONER KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHTS BEFORE MAKING THE INCULPATORY STATEMENT. THE STATEMENT WAS THEREFORE INADMISSIBLE".

WHEREFORE, petitioner states that the special and important circumstances in this instant case are equally, if not more important as those cited in Tague v. Louisiana, supra, because it is clear from the record evidence that the inculpatory statement allegedly given to detective Gery and introduced at the petitioner's trial to impeach his alibi defense was inadmissible because it was obtained in violation of petitioner's constitutional rights pursuant Miranda v. Arizona, 384 U.S. 436, 475.

WHEREFORE, for the reasons stated and cited herein your petitioner respectfully

submits that his convictions were obtained by a violation of the privilege against self-incrimination because the inculpatory and extra-judicial statement that detective Gery claims he made was admitted as evidence in violation of the standards set forth in Miranda v. Arizona.

As to petitioner's allegation concerning the overall sufficiency of the evidence at his trial, petitioner argues that absent the inculpatory statement given by detective Gery to impeach his alibi defense that pursuant Jackson v. Virginia, 47 U.S. L.W. 4883, that no rational trier of fact would have found him guilty of every element of the offences beyond a reasonable doubt.

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Honorable Court allow him to proceed in forma pauperis and that the petition for a writ of certiorari be granted, the judgment of the Circuit Court for the City of Richmond, Virginia, Division II, be reversed and/or voided, and this case be remanded to the appropriate State Court for further proceedings not inconsistent with this Court's opinion/s.

RESPECTFULLY SUBMITTED,

Roosevelt E Turner

ROOSEVELT ESAU TURNER, ASSISTED

DONALD MARVIN CARTER, ASSISTANT

Virginia State Penitentiary
P.O. Box 27264
Richmond, Virginia 23261

CERTIFICATE OF SERVICE

This is to certify that the petitioner, Roosevelt Esau Turner, declares under penalty of perjury that on this 25th day of March, 1980, he mailed a copy of this Petitioner's Brief In Support To Grant Of Certiorari to Mr. Marshall Coleman, Attorney General of Virginia, at Supreme Court-State Library Building, Richmond, Virginia 23219.

Roosevelt E Turner

ROOSEVELT ESAU TURNER, ASSISTED